No. 84

# In the Supreme Court of the United States

October Term, 1967

NORMAN W. BERGMAN, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

OCTOBER TERM, 1935

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No. 83

NORMAN W. BINGHAM, JR., ET AL., EXECUTORS, petitioners

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the District Court (R. 61–64) is reported in 7 F. Supp. 907. The majority and dissenting opinions in the Circuit Court of Appeals (R. 83–88) are reported in 76 F. (2d) 573.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 26, 1935. (R. 92.) The peti-

tion for a writ of certiorari was filed May 29, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether the proceeds of certain life insurance policies, taken out before the effective date of the 1918 Act, may under Section 402 (f) of the 1918 Act be included in the insured's gross estate, where the beneficiaries' defeasible interests became indefeasible only at the insured's death after the effective date of that Act.

### STATUTE INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, * * * intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. * * *
>
> (f) To the extent of the amount receivable by the executor as insurance under poli-

cies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

## STATEMENT

This case involves the inclusion in the gross estate of King Upton, who died on February 27, 1921 (R. 7), of the proceeds of five policies of insurance on his life. All five were taken out before the effective date of the Revenue Act of 1918. The insured continued to pay the premiums thereon up to the time of his death. (R. 9.)

Four of the policies, issued by the Berkshire Life Insurance Company, were originally payable to his executors, administrators, or assigns. (R. 11, 17, 23, 29.) On July 25, 1904, the insured assigned to his wife his interest in those policies, *provided she survived him.*[1] (R. 35, 62.) Three of those four policies contained provision for cash surrender. (R. 19, 25, 31.)

The fifth policy, issued by the Connecticut Mutual Life Insurance Company, named the decedent's wife as beneficiary with a provision that if she should predecease him, the proceeds would be payable to his children, or in default thereof, to his legal representatives. (R. 43.) The policy fur-

[1] The assignment was subject to a prior assignment (not material here) to the insurance company as security for a loan, which was outstanding at the time of his death.

ther provided that at the end of ten years from its date (May 22, 1883), or at the end of each five years thereafter, the company *would pay the cash value to the insured* upon surrender of the policy. (R. 43.)

The District Court ruled that none of the proceeds from these policies might be included in the decedent's gross estate, but its judgment was reversed by the Circuit Court of Appeals.

## ARGUMENT

The sole issue here is whether the proceeds of the five policies may be included in the insured's gross estate, in view of the fact that the policies were taken out before the effective date of the 1918 Act. Section 402 (f) of the 1918 Act requires the inclusion in a decedent's gross estate:

> To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

The court below decided that the proceeds of the five policies came within the purview of that section. The four Berkshire policies were included, since the interests of the assignee were contingent and became indefeasible only at the insured's death. The Connecticut policy was similarly included because it was only at the insured's death that it be-

came certain for the first time that he would never exercise the right to receive the cash value of the policy by surrendering it. We submit that the court below was correct, since the interests of the beneficiaries in the policies became complete for the first time at the insured's death, which occurred after the effective date of the 1918 Act. Hence, this case does not involve a retroactive application of the statute.

*Lewellyn* v. *Frick*, 268 U. S. 238, is not authority to the contrary. The opinion in that case did not consider the effect of the insured's power to terminate the policy by cash surrender or the effect of the contingent character of the beneficiary's interest. It is true that a careful examination of the record in the *Frick* case discloses policies similar to the above and also policies in which the insured retained the right to change the beneficiary. However, since this Court apparently did not consider the effect of such elements, the decision cannot be deemed as authoritative in this regard. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14.

This is strikingly illustrated in *Heiner* v. *Grandin*, 44 F. (2d) 141, 56 F. (2d) 1082 (C. C. A. 3d). That case involved policies in which the insured retained the right to change the beneficiary, and arose under the same statute as the *Frick* case. The court recognized (44 F. (2d) 141, 143) that the insured in the *Frick* case retained similar control as to some of the policies therein, but held that un-

der the circumstances the *Frick* decision was not binding. This Court denied certiorari. 286 U. S. 561. See also *Liebes* v. *Commissioner,* 63 F. (2d) 870, 873 (C. C. A. 9th).

*Levy's Estate* v. *Commissioner,* 65 F. (2d) 412 (C. C. A. 2d), is not in conflict with the decision below. It was there held that a tax may not be imposed *to the extent of* an annuity arising out of certain insurance policies in which the insured had irrevocably designated the annuitant.[2]

The petitioner alleges various conflicts with decisions of other Circuit Courts of Appeals, none of which appear to present the issue involved herein. In the main those cases are concerned with whether or not certain transfers of property were "intended to take effect in possession or enjoyment at or after" death. This case arises under another provision of the statute which in broad terms requires the inclusion in a decedent's gross estate of the proceeds of all life insurance policies. The only question here is whether such proceeds may be included where the policies were taken out before the effective date of any revenue act imposing such taxes. We believe that the court below correctly required their inclusion, since the rights

[2] In addition to the five policies involved in this petition, the Commissioner originally sought to include in the decedent's estate the proceeds from two other policies (the Manhattan policies). But the court below excluded them from the gross estate, because the beneficiaries had been irrevocably designated. (R. 88.) The Government is not seeking review as to those two policies.

arising out of those policies became complete only at the decedent's death.

## CONCLUSION

The decision below is correct, and is not in conflict with any decision of any other Circuit Court of Appeals or with any decision of this Court. The petition should be denied.

Respectfully submitted.

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